IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.402 OF 2006

IN

SUMMONS FOR JUDGMENT NO.836 OF 2004

IN

SUMMARY SUIT NO.2392 OF 2004

1. Samir Doshi, of Mumbai Indian Inhabitant Residing at Flat No.24, Shankar Sagar, 4th Floor, Sophia College Lane, Mumbai 400 026

2. Falcon Brokerage Pvt. Limited, a company incorporated under the Companies Act, 1956 and having its Registered Officer at 1001, P.J. Towers, Dalal Street, Mumbai 400 001 ...Appellants

Versus

1. Bajaj Hindusthan Limited, a company incorporated under the Companies Act, 1913, having its Registered Office at Bajaj Bhavan, 226, Jamnalal Bajaj Marg, Nariman Point, Mumbai 400 021

2. Jayantilal Khandwala & Sons Pvt.Ltd.a company incorporated under the Companies Act, 1956 and having its Registered Office at 201, Stock Exchange Tower, Dalal Street, Fort, Mumbai 400 001

3. Paresh Khandwala of Mumbai, Indian Inhabitant, residing at Flat No.36, Rekha Building II

Walkeshwar Road, Mumbai 400006) ...Respondents

Shri Janak Dwarkadas, Senior Advocate with Shri Prateek Sakseria and Shri Amit Vyas i/by Rajani Associates for the Appellants.

Shri Virag V. Tulzapurkar, Senior Advocate with Shri Senhal Shah i/by Dhru & Company for the Respondent No.1.

WITH

APPEAL NO.422 OF 2006
IN

SUMMONS FOR JUDGMENT NO.836 OF 2004

IN

SUMMARY SUIT NO.2392 OF 2004

Jayantilal Khandwala & Sons Pvt.Ltd.)
a Company incorporated under the)
Companies Act, 1956 and having its)
Registered Officer at 201, Stock)
Exchange Tower, Dalal Street, Fort,)
Mumbai 400 001) ...Appellant

Versus

1. Bajaj Hindustan Ltd. a Company)
incorporated under the Companies)
Act, 1913 having its Registered)
Office at Bajaj Bhavan, 226,)
Jamnalal Bajaj Marg, Nariman)
Point, Mumbai 400 021)

2. Samir Doshi of Mumbai, Indian)
Inhabitant, residing at Flat)
No.24, Shankar Sagar, 4th Floor,)
Sophia College Lane,)
Mumbai 400 026)

3. Paresh Khandwala of Mumbai,)
Indian Inhabitant, residing at)
Flat No.36, Rekha Building,)
11, Walkeshwar Road,)
Mumbai 400 006)

4. Falcon Brokerage Pvt. Ltd.)

a Company incorporated under)
the Companies Act 1956 and)
having its Registered Office at)
1001, P.J.Towers, Dalal Street,)
Mumbai 400 001) ...Respondents

AND

APPEAL NO.423 OF 2006

IN

SUMMONS FOR JUDGMENT NO.836 OF 2004

IN

SUMMARY SUIT NO.2392 OF 2004

Paresh Khandwala of Mumbai, Indian)
Inhabitant, residing at Flat No.36)
Rekha Building, 11 Walkeshwar Rd.,)
Mumbai 400 006) ...Appellant

Versus

1. Bajaj Hindustand Limited, a)
Company incorporated under the)
Companies Act, 1913 having its)
Registered Office at Bajaj)
Bhavan, 226, Jamnalal Building)
Marg, Nariman Point,)
Mumbai 400 021)

2. Jayantilal Khandwala & Sons)
Pvt.Ltd.a Company incorporated)
under the Companies Act, 1956)
and having its Registered)
Office at 201, Stock Exchange)
Tower, Dalal Street, Fort,)
Mumbai 400 001)

3. Samir Doshi of Mumbai, Indian)
Inhabitant, residing at Flat)
No.24, Shankar Sagar, 4th Floor,)
Sophia College Lane,)
Mumbai 400 026)

4. Falcon Brokerage Pvt. Ltd.)
a Company incorporated under)
the Companies Act 1956 and)
having its Registered Office at)

1001, P.J.Towers, Dalal Street,)
Mumbai 400 001) ...Respondents

Shri Chirag Balsara with Shri V.N. Kantawala, Ms Ambreen Saheed, Shri Vivek Sharma and Ms. Shewta Limaye i/by Kantawala & Company for the Appellant in Appeal Nos.422 of 2006 and 423 of 2006.

Shri Virag Tulzapurkar, Senior Advocate with Shri Snehal Shah i/by Dhru & Company for the Respondent No.1 in Appeal Nos.422 of 2006 and 423 of 2006.

CORAM : KSHITIJ R. VYAS, C.J. &
ABHAY S. OKA, JJ.

DATE : JUNE 28, 2006.

JUDGMENT:

1. These three Appeals have been preferred for challenging the Judgment and Order dated 03rd April, 2006 passed by the learned single Judge of this court on a summons for Judgment in a summary suit under Order XXXVII of the Code of Civil Procedure, 1908. By the impugned Judgment and Order, the learned single Judge granted a conditional leave to the Defendants to defend the suit subject to depositing a sum of rupees one crore within period of six weeks. The Appeal No.402 of 2006 has been preferred by the second and fourth Defendants. The Appeal No.422 of 2006 has been preferred by the first Defendant and the Appeal No.423 of 2006 has been preferred by the third Defendant.

2. The case of the Plaintiff-Company is that on 02nd July, 2001 the Plaintiff-Company placed with the first Defendant Company an inter-corporate deposit of Rs.3 crores for a period of 182 days carrying interest at 15 per cent per annum. According to the Plaintiff the inter-corporate deposit was to mature on 31st December, 2001. The Plaintiff paid the amount of Rs.3 crores by a cheque to the first Defendant and the first Defendant executed inter-corporate deposit receipt dated 02nd July, 2001. The first Defendant also executed a promissory note on 02nd July, 2001 promising to pay the said amount of Rs.3 crores together with interest at the rate of 15 per cent per annum on 31st December, 2001. According to the Plaintiff, the repayment of the inter-corporate deposit was personally guaranteed by the second and the third Defendants respectively who executed personal guarantees on 02nd July, 2001. With a view secure the due repayment of the deposit with interest by the first Defendant, the fourth Defendant entered into a Pledge Agreement dated 02n July, 2001 with the Plaintiff. Under the said Pledge Agreement, the fourth Defendant at the instance and on behalf of the first Defendant agreed to pledge securities, the value of which at all times being approximately 150% of the outstanding deposit. Under the Pledge Agreement, the

fourth Defendant pledged 01,21,100 equity shares (in dematerialised form) of Rs.10/- each (fully paid up) held by the fourth Respondent in the company called Khandwala Securities Ltd., a company listed on the Bombay Stock Exchange. According to the Plaintiff, the Pledged share constituted approximately 10.07% of the paid-up share capital of the Khandwala Securities Ltd.

3. As per the terms of the contract between the first Defendant and the Plaintiff, the Plaintiff was entitled to receive a sum of Rs.08,93,047/- on account of TDS on 01st October, 2001. The first Defendant issued a cheque dated 01st October, 2001 in the said amount drawn on the Bank of India, Stock Exchange Branch, Mumbai. The said cheque was dishonoured by the bankers of the first Defendant with the remark "insufficient funds". Subsequently, the said amount was paid by the first Defendant by three instalments. On the maturity date of the inter-corporate deposit i.e. on 31st December, 2001, the first Defendant handed over to the Plaintiff a cheque dated 31st December, 2001 drawn on Bank of India in the sum of Rs.3 crores and a cheque of the same date drawn on the same bank in the sum of Rs.08,93,047/- towards interest. Both the cheques were dishonoured by the

bankers of the first Defendant.

4. By the letter dated 02nd January, 2002 addressed to the first Defendant, the Plaintiff recorded the aforesaid facts and called upon the first Defendant to pay the deposit amount with interest. A similar letter was send by the Plaintiff on 15th April, 2002. By letters dated 17th October, 2002 and 31st March, 2003, the first Defendant confirmed the outstanding balance due and payable to the Plaintiff as on 30th September, 2002 and 31st September, 2003 respectively.

5. By Advocate's letter dated 22nd September, 2003 the Plaintiff called upon the Defendants to make payment of outstanding dues of Rs.03,91,302.41/- together with interest as set out in the letter. By the said letter the fourth Defendant was informed that if the outstanding amount was not paid within four days, the Plaintiff will have to proceed to sell the pledged shares in open market. The fourth Defendant replied to the said letter and raised certain contentions. As the amount was not paid, the Plaintiff sold the pledged shares in the open market in the period between 16th November, 2003 to 03rd April, 2004. However, only a sum of

Rs.01,16,05,009.26/- could be recovered from the sale of shares. Therefore, the Plaintiff's Advocate by letter dated 12th July, 2004 called upon the Defendants to make payment of the balance amount of Rs.02,99,04,684/- together with interest thereon at the rate of 15 per cent per annum. As the amount was not paid, the present summary suit was filed by the Plaintiff.

6. The summons for judgment was taken out by the Plaintiff which was contested by the Defendants by filing their separate reply. The contentions raised by the first Defendant is that the pledged shares have been infact parked with M/s. Sneh Capital and there was no genuine sale of the shares. It is contended that if the shares could have been sold at the prevailing market value, it would have covered the entire amount due and payable by the first Defendant. The second and third Defendants also raised similar contentions. It was contended that letters of guarantee constituted only an assurance given to execute a guarantee in future. The fourth Defendant contended that there is no genuine transaction of sale of the pledged shares. It was submitted that assuming that there was a genuine sale, there were several irregularities in the sale as a result of which sale

is void and therefore, the security of pledged shares was still available.

7. By the impugned Judgment and Order, the learned single Judge held that the defence of the Defendants cannot be accepted. However, the learned single Judge granted leave to the Defendants to defend the suit subject to deposit of Rs.1 crore in this Court. The present Appeals are preferred for challenging the said Judgment and Order.

8. Shri Janak Dwarkadas, the learned Counsel appearing for the Appellants in Appeal No.402 of 2006 which is preferred by the Defendant Nos.2 and 4 submitted that the Appellants have raised several triable issues. He submitted that the alleged letter of personal guarantee executed by the second Defendant is not at all a guarantee. It is an undertaking to give a guarantee in future. He submitted that the inter corporate deposit receipt, the Promissory Note and the Pledge Agreement relied upon by the Plaintiff are insufficiently stamped. He pointed out that in the plaint, the Plaintiff specifically relied upon contract notes of the sale of the pledged shares. However, the Plaintiff did not annex contract notes to the plaint and instead of contract notes, only the

bills issued by M/s.Sneh Capital, a sub broker were annexed to the plaint. He submitted that trade notes of the stock exchange forwarded by Mangal Keshav Securities Ltd.to the Sneh Capital do not prove that the pledged shares were sold by the Plaintiff. He pointed out that large number of shares of M/s.Khandwala Securities Pvt. Ltd are held by one Snehalata Nuwal who is a partner of Sneh Capital. He, therefore, submitted that the shares pledged with the Plaintiff are not at all sold and are merely parked with M/s Sneh Capital. He submitted that there is no real and genuine sale of the shares. He pointed out that even assuming that there is a sale of shares through the Sneh Capital, the sale is illegal as the same has taken place without compliance with mandatory requirements of law. He submitted that the Plaintiff could not have sold the shares through a sub-broker and the shares can be sold only by a direct contract between a member broker and the client. He submitted that there cannot be any lawful sale as there is a breach committed of SEBI (Stock Broker and Sub-Borkers) Rules and Regulations, 1992. He submitted that if the shares are sold today, the amount of price will cover the entire claim of the Plaintiff. He relied upon the decision of the Apex Court in the case of Mannalal Khetan & Ors. Vs.

Kedar Nath Khetan & Ors. ((1977) 2 Supreme Court Cases Page 429) in support of his contention. He also relied upon another decision of the Apex Court in the case of Mechalec Engineers and Manufacturers Vs. Basic Equipment Corporation (AIR 1977 Supreme Court Cases Page 577) and submitted that the defence of the Appellants is neither illusory nor moonshine and the defence was a fair and bonafide defence which entitles the Appellants to unconditional leave and therefore, the condition of deposit of Rs.1 crore imposed by the learned single Judge is required to be set aside.

9. Shri Balsara, the learned counsel appearing for the Appellant in the Appeal No.422 of 2006 (filed by the first Defendant) and in Appeal No.423 of 2006 (filed by the third Defendant) generally adopted the submissions of Shri Dwarkadas. He urged that the summary suit based on inter corporate deposit receipt was not maintainable in law. He submitted that the receipt is not duly stamped.

10. Shri Virag Tulzapurkar, learned Senior Counsel appearing on behalf of the original Plaintiff submitted that deposit receipt has been duly stamped in accordance with the relevant provision of the Indian Stamp Act. He pointed out that apart from the

deposit receipt and promissory note, the suit was based on cheques issued by the Defendant No.1 which have been admittedly dishonoured due to want of sufficient funds. He submitted that assuming that there are certain irregularities committed by M/s. Sneh Capital while selling the pledged shares, necessary action will be taken by the authorities against the erring broker and sub broker. He submitted that the transaction of sale of shares will not become illegal. He submitted that the Plaintiff has received the price of the shares sold through Sneh Capital by cheques. He pointed out that all the details and particulars of the shares sold by the Plaintiff appear in the bills issued by M/s. Sneh Capital which can be easily co-related to various cheques received from M/s.Sneh Capitals. He relied upon the decision of the Apex Court in the case of B.O.I. Finance Ltd. Vs. The Custodian and Ors. (AIR 1997 S.C. Page 1952). He pointed out obligations of the pledgor under the Indian Contract Act, 1872.

11. Shri Dwarkadas replied to the submissions of Shri Tulzapurkar by pointing out that failure to annex the contract notes to the plaint was fatal to the case of the Plaintiff.

12. We have considered the submissions. The Inter corporate Deposit receipt dated 02nd July, 2001 in the sum of Rs.30,000,000/- (Rupees Three Crores only) is admittedly executed by the Defendant No.1. The said receipt appears to be duly stamped in accordance with the Indian Stamp Act, 1899. There does not seem to be any dispute regarding the receipt of a sum of Rs.3 crores by the first Defendant from the Plaintiff by way of Inter Corporate Deposit. There is no dispute about execution of the promissory note by the first Defendant. Thus, there cannot be any dispute that the first Defendant received an Inter Corporate deposit of Rs.3 crores for a period of 182 days which was to carry interest of 15 per cent per annum. There are balance confirmation letter dated 17th October, 2002 and 31st March 2003 signed on behalf of the first Defendant in which liability to pay Rs.3 crores with interest thereon has been duly acknowledged. Prior to execution of the said letters of acknowledgment, on 31st December, 2001 i.e. on the date of repayment of deposit, the first Defendant issued a cheque in the sum of Rs.3 crores in favour of the Plaintiff. On the same day a separate cheque was issued by the Defendant No.1 in favour of the Plaintiff in the sum of Rs.08,93,047/-. Both the cheques were dishonoured.

It is not the case of the first Defendant that any amount is repaid to the Plaintiff. On 17th October, 2002 the first Defendant signed a letter addressed to it by the Plaintiff for confirming that a sum of Rs.34,515,411/- was payable by the first Defendant to the Plaintiff. Thus, the liability of the first Defendant has been clearly established.

13. So far as the second and third Defendants are concerned, it will be necessary to refer to the letters of guarantee signed by both of them. About the execution of letters there is no dispute. The letters are identically worded. The letter signed by the second Defendant reads thus:

" On stamp paper of Rs.100/-

LETTER OF PERSONAL GUARANTEE

I, Samir S. Doshi, residing at Flat No.24, Shankar Sagar, 4th Floor, Sophia College Lane, Mumbai-400 026, **do hereby undertake to guarantee personally and out of my personal assets the due and punctual payment of all and every sum payable by JAYANTILAL KHANDWALA & SONS PVT. LTD.**

for the short term loan of Rs.3,00,00,000/-(Rupees three crores only) taken by them against the 8,53,100 shares of Khandwala Securities Ltd.from Bajaj Hindustan Ltd. having office at 2nd floor, Bajaj Bhawan, Nariman Point, Mumbai-23. For the said ICD The Tri-partiate agreement has already been executed.

I further agree to stand by the terms and conditions mentioned in the above documents pertaining to the short term loan. In Witness whereof, I, Samir S. Doshi, signed this on 2nd day of July 2001 at Mumbai.

Sd/-
Samir S. Doshi

Witness: Sd/-
(Prashan Nima)"
(Emphasis supplied)

14. It is obvious that the second Defendant has clearly and unequivocally guaranteed repayment of the amount due and payable by the first Defendant to the Plaintiff. Both the letters are duly stamped in accordance with law. Thus, the defence of the said

Defendants that the letters cannot be read as guarantee cannot be accepted.

15. Therefore, the entire controversy revolves around the defence of the fourth Defendant. It will be necessary to refer to the relevant clauses of the Pledge Agreement executed by the said Defendant as the pledger, the Plaintiff as the Pledgee and the first Defendant as the Beneficiary. Clause No.1, 3(a), 9(a), 10 of the said Agreement read thus:

> "1. The Pledgee shall deposit a sum of Rs.3,00,00,000/- (Rupees three crores only) with the Beneficiary for a period of 182 days from 2nd day of July in the year two thousand and one or from such other date on which the deposit is actually disbursed to the Beneficiary.
>
> 3(a) Before placing the deposit by the Pledgee with the Beneficiary, the Pledger shall pledge with the Pledgee the securities held in its name as per Schedule I of this Agreement.
>
> 9(a) In case the Pledgee exercises his

right to sell the pledged securities, he may sell the said securities by public auction or private contract or in any other manner whatsoever and he may apply the net proceeds after meeting all expenses incidental to or in any way connected to such sale, towards liquidation of outstanding deposit, interest including penal interest thereon, all costs, charges and expenses arising out of the default, act, declaration or application aforesaid and towards liquidation of the amounts, if any, due on the general balance of account of the Beneficiary with the Pledgee, whether the said balance be due in respect of the moneys hereinbefore specifically referred to or on any other account whatsoever. In the event of the net sale proceeds being not sufficient for extinguishing the entire liability of the Beneficiary to the Pledgee, the Pledgee shall be entitled to claim the balance from the Beneficiary whereas the surplus, if any, shall be held by the Pledgee in trust for the Beneficiary.

10. No suit shall be maintainable

against the Pledgee regarding the manner of timing of sale of pledged securities, where the securities are sold in exercise of rights exercisable by the Pledgee under this Agreement or under any other law for the time being in force."

16. Schedule I discloses that initially 8,53,100 shares of Khandwala Securities Ltd. having value of Rs.44.10 per share were pledged with Plaintiff as per clause 3(a) of the Pledge Agreement. A notice dated 22nd September, 2003 was issued on behalf of the Plaintiff by M/s Dhru & Co, Solicitors calling upon the Defendants to pay outstanding amount. It was stated in the notice that on failure to pay the amounts, pledged shares will be sold. The fourth Defendant replied to the notice on 27th October, 2003. In the said reply the fourth Defendant did not dispute the execution of the Pledge Agreement and the fact that 10,21,100 equity shares of Khandwala Securities Ltd. were pledged with the Plaintiff. In the reply it was stated that as on 31st December, 2001 the pledged shares had considerable value and the value has diminished subsequently. It was tried to be contended that the Agreement has been signed merely to accommodate the transaction of Inter Corporate

deposit. It was stated that the involvement of the fourth Defendant was a mere formality.

17. By the letter dated 12th July, 2004, the solicitors of the Plaintiff informed the fourth Defendant that all the pledged shares were sold during the period between November 16 to 03rd April, 2004. A statement showing the details of sale with all particulars of the sale was annexed to the said letter. The fourth Defendant was informed that after appropriating sale proceeds of the pledged shares, a sum of Rs.2,99,04,684/- was outstanding as on 03rd April, 2004 together with interest.

18. According to the case of the Plaintiff, they have realised Rs.1,16,05,009/- by sale of the pledged shares. In paragraph No.6 of the reply filed by the Defendant No.4 to the summons for Judgment, it is stated as under:

> "6. Without prejudice to the aforesaid, the Plaintiff has by its conduct disentitled itself from receiving any amount whatsoever from the Defendants. I say that the Plaintiff failed to give adequate notice for the sale of pledged 10,21,100 shares as security fro the Inter Corporate Deposit. I

> further say that Plaintiff has sold the shares at its own whims and fancies and have contended to have realised only Rs.1,16,05,009 from the sale thereof. Without prejudice to the aforesaid, it is submitted that the Plaintiffs have contended that they have sold the aforesaid shares between 16th November, 2003 and 03rd April, 2004 as per the Schedule annexed and marked Exhibit "O" to the plaint. It is submitted that the aggregate price of the said shares alleged to have been realised by the Plaintiff is Rs.13 per share approximately. I say that the Plaintiffs have not acted prudently and realised the best price in respect of sale of the shares as the shares if had been retained by the Plaintiff an amount of Rs.40 per share, being the present value of the shares, could have been realised and the entire claim of the Plaintiff would have been wiped out."

As stated earlier, in letters dated 27th October, 2003, the fourth Defendant had stated that value of the pledged shares had diminished considerably. The Plaintiff has annexed Bills (Page 168 to 228) issued

by M/s Sneh Capital giving all particulars of the sale of pledge shares. All payments have been received by the Plaintiff by cheques. The rates at which the shares are sold are also stated in the Bills. It is not the case of the Defendants that the rates at which the shares have been sold were lower than the prevailing market rates at the time of sale. In any event no material in that behalf has been produced. The case of the Defendants is that if the shares were not sold earlier, the same would have at present
fetched a very high rate. The shares were sold by the Plaintiff after giving notice under section 176 of the Contract Act. There are documents produced to show that the pledged shares were sold by Mangal Keshav Securities Ltd on the floor of the Bombay Stock Exchange and the National Stock Exchange. The Trade Notes of the stock exchanges have been produced. Extract of ledger account of M/s. Sneh Capital has been also produced. There is enough material on record to establish the sale of pledged shares by the Plaintiff through M/s Sneh Capital. Merely because a Partner/Proprietor of Sneh Capital is shown to be holding shares of M/s. Khandwala Securities Ltd is not sufficient to jump to the conclusion that the said shares held by the Partner/Proprietor are the

pledged shares. Admittedly pledged shares constitute only 10.07% of the subscribed capital of the Company. As there is sufficient material on record to show that the pledged shares were sold, mere failure to annex contract notes to the plaint is no ground to disbelieve the fact of sale of the pledged shares. Even assuming that there is any irregularity committed by M/s. Sneh Capital, the sale will not become illegal or void. No legal provision has been shown to us which makes the said sale illegal or void. The provisions of the relevant rules/regulations show that the erring brokers or sub brokers can be penalised for irregularities. Therefore, the decision of the Apex Court in the case of the Mannalal Khetan (supra) relied upon by Shri Dwarkadas will have no application.

19. The pledged shares have been sold as per the Agreement. The rates at which the shares were sold are not shown to be below the prevailing market rates. The theory that the Plaintiff has merely parked the shares cannot be accepted in view of the documents on record. The suit is also based on the cheques issued by the first Defendant which were dishonoured. Therefore, a summary suit under Order XXXVII is maintainable. There is hardly any merit in the

defence of any of the Defendants.

20. The learned single Judge has imposed condition of deposit of Rs.1 crore as against suit claim of nearly three crores. Though the learned single Judge has held that defences raised cannot be countenanced, a leave to defend has been granted subject to deposit of Rs.1 crore which is only the one third of the suit claim on the date of institution of the suit. Therefore, there is no error in the order of learned single Judge.

21. Hence, the Appeals are dismissed with no order as to costs. On the prayer made by the learned Counsel appearing for the Appellants, time to deposit Rs.1 crore is extended by a period of eight weeks from today.

CHIEF JUSTICE

ABHAY S. OKA,J